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COMMONWEALTH

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SOUTHERN VERMONT RAILROAD?

Troy and Boston railroad co.

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WHAT TITLE AND INTEREST HAS THE COMMONWEALTH IN THE SOUTHERN VERMONT RAILROAD?

It having been urged before the Hoosac Tunnel Committee that the Commonwealth has a perfect title to the Southern Vermont Railroad, that the lease of that railroad to the Troy and Boston Railroad Company was not made till after it was mortgaged to the Commonwealth, and that the lease was merely a pretended lease which the Commonwealth may now disregard, the following statement is now made, showing in detail what title and interest the Commonwealth has in the Southern Vermont Railroad.

The first step taken by the Commonwealth towards acquiring any such interest was the Statute of 1860, *c.* 202, § 8, which contains the following provisions: "The Troy and "Greenfield Railroad Company is hereby authorized and "required to purchase the entire road, franchise, stock, bonds "and other property of the Southern Vermont Railroad Com-"pany, *together with the income, benefits and reversion of its* "*lease to the Troy and Boston Railroad Company, and subject* "*to its provisions*, for the sum of two hundred thousand "dollars; and for the purpose of enabling them to make such "purchase, and transfer the same to the Commonwealth as "additional security to the Commonwealth for its whole loan, "a further issue and loan of State scrip in Federal currency, "of the description specified in Chapter 226 of the Acts of "the year 1854, is hereby authorized to be made to the "amount of two hundred thousand dollars, deliverable as "follows, namely:

"Whenever all the capital stock of the Southern Vermont

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"Railroad, excepting not exceeding twenty shares of one "hundred dollars each, and one hundred thousand dollars of "its mortgage bonds with coupons attached, the whole "amount being one hundred and fifty thousand dollars, pay- "able in twenty years from the date of issue, with six per "cent interest, payable semiannually at the Bank of Com- "merce, in the city of New York, *and the aforesaid lease of "said company to the Troy and Boston Railroad Company, "together with the rent reserved therein of twelve thousand "dollars per annum, payable semiannually, shall have been "transferred to the treasurer of the Commonwealth*, for the "future security of the Commonwealth for its whole loan of "credit to the Troy and Greenfield Railroad Company, in such "manner as the attorney-general shall prescribe, and to the "satisfaction of the governor and council, the State treasurer "shall deliver one hundred and twenty-five thousand dollars "of said scrip to the treasurer of the Troy and Greenfield "Railroad Company." [There were further provisions for the delivery of the balance of the scrip to the treasurer of the Troy and Greenfield Railroad Company.]

"*The semiannual payment of the coupons, with the balance "of the income from the lease of the Southern Vermont "Railroad, shall be collected by or paid to the State "Treasurer.*"

In pursuance of this legislation, the governor and council, on the 3d of May, 1860, accepted the mortgage made by the Troy and Greenfield Railroad Company to the Commonwealth, of the franchise and property of the Southern Vermont Railway Company, *and of the lease of the same to the Troy and Boston Railroad Company.* The report of a Committee of the Executive Council on the conveyances of the Southern Vermont Railroad contains the following: —

[See Senate Doc. of 1874, No. 150, p. 113, for this Report in full.]

"EXECUTIVE DEPARTMENT,
"BOSTON, May 3, 1860.

"The Committee of the Council to whom was referred "(under the 8th section of Chapter 202 of the laws of 1860) "the mortgage of the Commonwealth by the Troy and "Greenfield Railroad Company, of the franchise and property "of the Southern Vermont Railroad Company, *and the lease "of the same to the Troy and Boston Railroad Company*, "together with the accompanying papers, as specified in a "communication to His Excellency the Governor and the "Honorable Council, dated April 26, 1860, and signed by "Wendell T. Davis and H. Haupt, a committee appointed "by the Troy and Greenfield Railroad Company for that pur- "pose, — which papers accompany this report, and are "marked A, B, C, D, E, F, G, H, I, J, K, L, M, and N,— "have given the subject a careful consideration, and report: "That said mortgage and accompanying papers are correct, "satisfactory, and according to the provisions of said Chap- "ter 202, Section 8, of the laws of 1860."

[The Report then states a compliance with the other provisions of that statute.]

"The committee also report that said papers are indorsed "by the attorney-general of the Commonwealth as correct "and according to the statute provisions."

"ELIPHALET TRASK,
"J. M. CHURCHILL,
"HUGH W. GREENE,
"*Committee.*"

"COUNCIL CHAMBER, May 3, 1860.

"The foregoing Report is by the governor and council accepted.

"OLIVER WARNER,
"*Secretary of the Commonwealth.*"

The mortgage of the Southern Vermont Railroad, and a copy of the lease of the same to the Troy and Boston Railroad Company, together with the accompanying papers, were in fact transmitted by the Troy and Greenfield Railroad Company to the executive of the Commonwealth on the twenty-eighth of April, 1860, as appears by a letter of Gen. Haupt to Gov. Banks, which is on file among the papers in the office of the treasurer of the Commonwealth. That letter contains the following: —

"April 28, 1860.

"To His Excellency N. P. Banks:

"*Dear Sir*, — Accompanying this note you will find an "official communication containing a list of papers and documents pertaining to the purchase and transfer to the State "of the Southern Vermont Railroad Company. It has required much effort to conclude all the arrangements in time "to lay the matter before council at their meeting on the "30th inst., but I have so far succeeded as to be able to present all the papers considered necessary, except the lease, "of which I enclose a copy, and will have the original by "about Tuesday of next week. The delay has been caused "by the discovery of a difference in the date of the two "parts, *which the inclosed copy of a supplement executed on "last Friday (yesterday) by the Troy and Boston Railroad "Company will fully explain.*"

The official communication referred to in the above letter, and also in the report of the Committee of the Council, was dated April 26, 1860, though not actually sent till April 28, and is on file in the office of the treasurer of the Commonwealth. It is addressed to "His Excellency N. P. Banks, Governor, and to the Honorable Council of the State of Massachusetts," and is signed by "Wendell T. Davis and H. Haupt, Committee of the Troy and Greenfield Railroad Company." In it, the committee submit the papers marked from "A" to "N," and among them were the following: —

"E. Affidavit of officers and directors of the Southern "Vermont Railroad Company, showing that the said road "was opened for business on March 1, 1859, and that since "April 1, 1859, the trains have run without interruption, "*and that the Troy and Boston Railroad Company have* "*promptly made the payments required by their lease of said* "*road.*"

F. Deed from Southern Vermont Railroad Company to the Troy and Greenfield Railroad Company.

G. Mortgage from the Troy and Greenfield Railroad Company of the Southern Vermont Railroad to the State of Massachusetts.

"H. *Lease of the Southern Vermont Railroad by Troy* "*and Boston Railroad Company, duly executed and at-* "*tached to mortgage.*"

L. A certificate of incumbrances on the Southern Vermont Railroad.

The above affidavit, marked "E," is on file in the office of the treasurer of the Commonwealth, and is as follows: —

"The undersigned, officers and directors of the Southern "Vermont Railroad Company, do hereby certify that the "Southern Vermont Railroad was opened for business on "the first day of March, A. D. 1859, *and from the first day* "*of April next following the Troy and Boston Railroad* "*Company have operated the said road without interruption,* "*and have regularly and promptly made the payments re-* "*quired by their lease of the road, dated the twenty-first day* "*of November, A. D.* 1856.

"R. Carpenter, Jr., *President.*
"H. Haupt, *Treasurer.*
"Orrin Bates, *Clerk.*
"John M. Potter.
"Henry Cartwright."

"Subscribed and sworn to before me, this twenty-first day of April, A. D. 1860.

"A. B. Gardner, *Justice of the Peace.*"

The paper marked "L" was a certificate of incumbrances on the Southern Vermont Railroad, and it was subscribed and sworn to April 27, 1860, by A. B. Gardner, and contains the following: —

"*A lease of said railroad to the Troy and Boston Railroad "Company, during the continuance of its charter.*"

The attorney-general of the Commonwealth made the following certificate of his examination of the above papers marked from "A" to "N": —

"COMMONWEALTH OF MASSACHUSETTS.

"MAY 2, 1860.

"I have examined the papers specified in the above sched-"ule, and find them correct and according to the statute pro-"vision.

"STEPHEN H. PHILLIPS,
"*Attorney-General.*"

Among these papers, those which constitute the actual record title of the Commonwealth, marked "F," "G" and "H," are all fastened together as one instrument, and contain mutual references to each other, as hereinafter shown, and bear a special certificate of the attorney-general, as follows:

"COMMONWEALTH OF MASSACHUSETTS.

"MAY 2, 1860.

"The accompanying transfer is satisfactory in form and in "compliance with the provisions of the Statute of 1860, "Chap. 202, Sect. 8.

"STEPHEN H. PHILLIPS,
"*Attorney-General.*"

The lease to the Troy and Boston Railroad Company was in express terms referred to in the deed of the Southern Vermont Railroad to the Troy and Greenfield Railroad Com-

pany, and in the mortgage by the latter company to the Commonwealth, as annexed thereto; and it was in fact so annexed and made a part thereof.

Those papers thus fastened together as one instrument are, in detail, as follows :—

1. Deed by the Southern Vermont Railroad Company to the Troy and Greenfield Railroad Company, dated April 21, 1860.

This deed recites that the St. of 1860 "authorized and "required the Troy and Greenfield Railroad Company to "purchase the entire road, franchise, bonds and other prop- "erty of the Southern Vermont Railroad Company, *together* " *with the income, benefits and reversion of its lease to the Troy* "*and Boston Railroad Company*," and after certain other recitals proceeds to grant to the Troy and Greenfield Railroad Company its railroad and property, "*including the* "*lease made by said grantor corporation to the Troy and Boston Railroad Company, dated the twenty-first day of November, in the year one thousand eight hundred and fifty-six,* ***one part of which, held by the lessor corporation, is hereto annexed,*** and all the income, benefits and reversion thereof."

2. Annexed to the foregoing is one part of the original lease of the Southern Vermont Railroad to the Troy and Boston Railroad Company, namely, the part which was executed by the Troy and Boston Railroad Company, agreeing to pay $12,000 per year as rent. This instrument is dated Nov. 21, 1856, and bears the certificate of S. H. Blackmer, County Clerk of Bennington County, Vermont, that it was recorded March 10, 1858.

By its terms, "the said party of the first part doth hereby "lease and let unto the party of the second part, for and "during the term of the continuance of the charter of said "Southern Vermont Railroad Corporation, and for and dur- "ing the term or terms of any renewal or renewals of said "charter that may hereafter be obtained, their railroad, when "finished, extending from its intersection with the Troy and "Greenfield Railroad on the east to the point of intersection

"with the Troy and Boston Railroad on the west, together "with all the lands, depot-houses, water-tanks or other "structures, belonging or that may hereafter belong to said "corporation, the party of the first part." . . . . . .

"And the said Troy and Boston Railroad Company, upon "the completion of said Southern Vermont Railroad and its "acceptance, for its part agrees and binds itself as follows, "namely: That it will pay or cause to be paid to the said "Southern Vermont Railroad Company for the use of said "railroad and fixtures, the sum of $12,000 per annum, as "follows: At the Bank of Commerce, New York City, the "interest coupons on such bonds as the Southern Vermont "Railroad Company shall issue in payment for construction "of said road, which sum shall not exceed $150,000, at an "interest not to exceed six per cent per annum, the principal "payable in not less than twenty years from the first day of "May next. The balance of the $12,000 payable semi-"annually at their office in the city of Troy."

Indorsed upon the foregoing instrument is a certificate by Judge Gould, that on the 27th of April, 1870, D. Thomas Vail (president of the Troy and Boston Railroad Company) made affidavit before him to the effect that said instrument was duly executed, — "all which is to me satisfactory evi-"dence of said facts, and the instrument is authorized to "be recorded."

The said instrument or lease had been already recorded March 10, 1858, as appears by the proper certificate indorsed upon it; and the certificate of Judge Gould was also recorded April 27, 1860.

3. Agreement between the Southern Vermont Railroad Company and the Troy and Boston Railroad Company, dated and recorded April 27, 1860, identifying the bonds referred to in the foregoing lease.

This agreement in substance recites the former letting of the Southern Vermont Railroad to the Troy and Boston Railroad, and that the lease was executed in separate parts, one of which parts was dated Nov. 21, 1856, and the other Jan.

9, 1857, and that there was a discrepancy between these two parts in the times to be fixed for the maturity of the bonds of the Southern Vermont Railroad, and that the bonds, as actually made and issued, were payable at a certain date named, and accordingly the parties mutually acknowledge and agree that the bonds, as actually made and issued, are the bonds intended to be provided for in and by the provisions of said lease.

4. Mortgage by the Troy and Greenfield Railroad Company, of the Southern Vermont Railroad, to the Commonwealth, dated and recorded April 21, 1860.

This mortgage, after referring to the St. of 1860, grants to the Commonwealth the railroad and property of the Southern Vermont Railroad Company, "*including the lease* "*made by the said Southern Vermont Railroad Company* "*to the Troy and Boston Railroad Company, dated the twenty-* "*first day of November, in the year* 1856, ***one part of which,*** "***held by the grantor corporation, is hereto annexed,*** and all "the income, benefits and reversion thereof," and referring to the deed of the Southern Vermont Railroad Company of the same date as "*hereto annexed and made part hereof.*"

[The above four papers are all printed in full in Senate Doc. of 1874, No. 150, pp. 105–108, 100–103, 103–105, 108–111.]

It thus appears that the Commonwealth, in acquiring its interest in the Southern Vermont Railroad, was dealing only with the Troy and Greenfield Railroad Company, and not with the Troy and Boston Railroad Company; that, in the whole transaction, the Legislature, the attorney-general, and the governor and council had always in mind the lease to the Troy and Boston Railroad Company, and relied upon the promise of the Troy and Boston Railroad Company to pay rent of $12,000 a year, as the chief security to the Commonwealth; and that the Commonwealth's title was in express terms made subject to that lease, a copy of which was made

a part of the very conveyance under which the Commonwealth holds.

This has been well understood and acted on by all public officers and legislative committees of the Commonwealth from the beginning, as appears by the following documents: —

A petition of the Troy and Greenfield Railroad Company to the General Court in January, 1857 (House Doc. of 1857, No. 18, p. 2), sets forth that "the Southern Vermont Rail-"road is under contract and to be fully completed by Sep-"tember first next, *and is also leased to the Troy and Boston* "*Raiload Company.*"

A report of the attorney-general of the Commonwealth (Hon. Dwight Foster), dated April 15, 1862 (Senate Doc. of 1862, No. 157), says as follows: —

"The result of the accompanying conveyances and statutes "relative to the Southern Vermont Railroad, is to give the "Commonwealth security *upon the lease by the Southern* "*Vermont Railroad Company to the Troy and Boston Rail-*"*road Company* (*which reserves an annual rent of* $12,000) "for the loan of $200,000 under Section 8, Chapter 202, Acts "of 1860, and also for the entire $2,000,000 loan; and fur-"ther, to transfer, *subject to said lease*, the franchise and "property of said railroad to the Troy and Greenfield Rail-"road Company, and to make the latter company a corpora-"tion in Vermont as well as in Massachusetts, and to mort-"gage the property thus transferred to the Commonwealth, "so that it becomes security for the same loans *in the event* "*of a forfeiture of the lease.*"

The report of the Hoosac Tunnel Commissioners in 1869, Alvah Crocker, Tappan Wentworth and S. W. Bowerman [House Doc. of 1869, No. 192; reprinted in Senate Doc. of 1874, No. 150] contains the following: —

"Previous to the purchase of the Southern Vermont Rail-"road by the Troy and Greenfield Railroad Company, "the corporation owning the former road had by a lease,

"dated Nov. 21, 1856, and which was probably executed "Jan. 8, 1856, *conveyed its road, with all the lands, depot-* "*houses, water-tanks, or other structures belonging, or that* "*may hereafter belong, to the party of the first part . . .* "*for a term coextensive with the duration of its charter and* "*any renewal of the same to the Troy and Boston Railroad* "*Company*, a corporation established in New York, and own- "ing a railroad now running from the city of Troy to a "point connecting with the location of the Southern Vermont "Railroad." Pages 37, 38.

The report then goes on to give certain particulars of the lease, and especially as to the annual rent of $12,000.

The report of the Joint Standing Committee of the Legislature for 1872 (Senate Doc. of 1873, No. 201) says: —

"*Southern Vermont Railroad.* This line of six miles of "railroad, following in its route the valley of the Hoosic "River, extends in a northwesterly direction across the "southwestern corner of Vermont, to a junction with the "Troy and Boston Railroad at the eastern line of the State "of New York. The title vests in the Commonwealth, *but* "*the immediate interest of the State is now confined to the* "*receipt of an annual rental for its use from the Troy and* "*Boston Railroad Company, which holds it under the per-* "*petual lease that was obtained from the Southern Vermont* "*Railroad Company, before the sale by that corporation of* "*the ownership of its railroad to the Troy and Greenfield* "*Railroad Company, through whom the State has subse-* "*quently obtained its title.* We have mentioned this, because "of its being one of the adjacent railroad interests of the "Commonwealth to which we deem it appropriate for us to "make reference; but in all considerations as to railway con- "nection, it may practically be deemed a part of the Troy "and Boston Railroad, inasmuch as this company holds the "unlimited power of its management and control."

The report of the corporators, ex-Gov. William B.

Washburn and others, in 1875, contains a legal opinion by James C. Davis, Esq., dated Dec. 31, 1874, as to the title of the Commonwealth in the Tunnel line, which is as follows, concerning the Southern Vermont Railroad: —

"The Southern Vermont Railroad Company was incorporated under the laws of the State of Vermont. . . . "This road is owned by the Commonwealth, under foreclosure of a mortgage given by the Troy and Greenfield "Railroad Company. *It is subject to a perpetual lease to the "Troy and Boston Railroad Company and is operated by this "company, which pays for it an annual rental of* $12,000. "No right has been reserved to the Commonwealth to take "possession of this road, except in the event of the failure of "the lessees to pay the rent, and as it lies wholly without the "jurisdiction of the Commonwealth it cannot be taken under "the right of eminent domain."

The Commonwealth took its title to the Southern Vermont Railroad in express subordination to the vested rights of the Troy and Boston Railroad Company under the lease; it has always recognized the same, and regularly collects the rent of $12,000 a year, which is due under the lease. Will it now attempt to interfere with those vested rights? To call upon that company to surrender and cancel its lease, under threat of entering upon its leased property and building another railroad there, would be virtually an attempt at confiscation; which cannot be carried out under the laws of the land.

THE TROY AND BOSTON R. R. CO.,

By Charles Allen,

its Attorney.

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